

Update on CWA Section 303(c) Water Quality Standards Litigation August 15, 2019

Court Decisions

1. Approval of Montana's Variances to the State's Numeric Nutrient Criteria (NNC)

- Summary of Court Decision. On March 25, 2019, the court issued a partially favorable ruling upholding EPA's authority to approve water quality standard variances based on costs. The court also held that EPA's approval of a seventeen-year term was arbitrary and capricious based on the court's interpretation that the highest attainable condition is a level that "presently can be attained" and that providing such time to merely meet the less stringent nutrient standard did not "comport with the purposes of the CWA." Order at 27-28. On July 16, 2019, the court partially remanded and vacated EPA's approval of the seventeen-year term with instructions that the Montana Department of Environmental Quality (DEQ) adopt a new timeline for the state's variance within 120 days and that EPA complete its review within 90 days of DEQ's submission. The court's order directed the agencies "to set forth a reasonable schedule that begins with relaxed criteria of the Current Variance Standard and leads to compliance with DEQ's underlying base nutrient criteria in the time range proposed by Plaintiffs." Order at 5. The court stayed its vacatur until EPA approves a replacement variance in accordance with the court's order
- Overview. On May 31, 2016, the Upper Missouri Waterkeeper filed a lawsuit in the U.S. District Court in Montana challenging EPA's 2015 approval of Montana's general variances for public and private dischargers to waters with NNC. *Upper Missouri Waterkeeper v. EPA*, No. 4:16-cv-00052 (D. Mont.) EPA approved the variances before the Agency finalized its new water quality standards variance regulations at 40 CFR 131.14 in August 2015. After briefing was completed but before the judge issued a ruling, Montana adopted and EPA approved a new nutrient variance for 36 POTW discharges, including both mechanical plants and lagoons, under section 131.14. Plaintiff amended its complaint to challenge the 2017 approval. In briefing, Plaintiff argued that (1) water quality standards cannot be based on costs and (2) EPA's approval of the term of the variance is arbitrary and capricious.

2. Disapproval of West Virginia Site-Specific Copper Criterion

- Summary of Court Decision: On March 12, 2019, the US Court of Appeals for the Fourth Circuit affirmed the District Court's judgment granting EPA's motion for summary judgment in a challenge by a public sewer utility to EPA's July 19, 2016 disapproval of a site-specific copper criteria submission. The District Court had found that plaintiff's challenge had been rendered moot when, following the disapproval, the State issued a NPDES permit for the plaintiff's water treatment facility based on the approved statewide criteria that did not include any copper effluent limit. The Court of Appeals disagreed that the case was moot but affirmed EPA's disapproval of the State's criteria. The Court endorsed the importance of EPA's independent discretionary authority under the applicable statutes and, upon review of the decision document, held that EPA "employed the scientific expertise and grounded judgment that the Clean Water Act contemplates."
- Overview. The Sanitary Board of the City of Charleston, West Virginia, filed a lawsuit

on March 31, 2016 alleging that EPA had a nondiscretionary duty to approve or disapprove a submission by the West Virginia Department of Environmental Protection of a site-specific water quality criterion for copper resulting from a Water Effect Ratio (WER) applied to West Virginia's current copper criteria. *Sanitary Board of the City of Charleston, West Virginia v. Pruitt, et al.*, No. 2:16-cv-03060 (S.D.W. Va.). The lawsuit also alleged that EPA had a nondiscretionary duty to approve the standard because a pre-decisional comment letter to the WVDEP suggested that it met the requirements of the CWA. On July 19, 2016, EPA Region 3 disapproved the WER as insufficiently protective and successfully moved to dismiss those claims. However, the Sanitary Board subsequently amended its complaint and challenged the disapproval as arbitrary and capricious, contrary to law and in excess of statutory authority, and without observance of the procedure required by law. While the litigation was pending, WVDEP renewed the Sanitary Board's NPDES permit and did not subject the Sanitary Board to any limitation on the discharge of effluent copper because it concluded that there is no reasonable probability that the Sanitary Board would violate the default water quality standard for copper. The Sanitary Board filed a motion for summary judgment contesting EPA's disapproval as scientifically unsound and EPA filed a cross-motion for summary judgment to dismiss the case as moot. The Court found that since the Sanitary Board was not subject to a copper limit under the existing statewide criteria, it suffered no injury when EPA disapproved the less stringent site-specific criteria. Accordingly, the Court dismissed the Sanitary Board's Complaint. The Sanitary Board appealed, arguing that the case was not moot, and arguing that EPA's decision was arbitrary and capricious. The Sanitary Board's primary arguments were that EPA was prohibited from considering information developed after the 90-day statutory deadline to act had elapsed and that EPA's disapproval was arbitrary and capricious it relied in part on the results of its own Biotic Ligand Model (BLM) calculation instead of solely considering the Water Effect Ratio (WER) results produced by the State. The Court of Appeals rejected both arguments and affirmed EPA's disapproval. A separate appeal is currently pending regarding whether EPA is liable for a portion of the Sanitary Board's attorney fees on the theory that the Agency missed the Clean Water Act deadline to act on the State's submission and was compelled to do so by the Sanitary Board's complaint.

- Key issues. (1) Whether pre-decisional correspondence between EPA and a state can create a mandatory duty for EPA to approve a state WQS submission; (2) whether EPA can rely on a biotic ligand model result as a basis to disapprove a WER-based criteria submission; (3) whether a discharger suffers a legal injury from the denial of a site-specific criteria when it is already meeting the existing statewide standard; and (4) whether EPA may consider information developed after the Clean Water Act deadline to act on a state water quality submission has elapsed.

3. Approval of Minnesota's Combined Numeric Nutrient/Eutrophication Criteria
Summary of Court Decision. On March 31, 2019, the U.S. District Court for the District of Columbia granted EPA's motion for summary judgment against a Complaint filed by the Center for Regulatory Reasonableness challenging EPA's approval of Minnesota's combined nutrient criteria for eutrophication in rivers and streams. CRR claimed that Minnesota's criteria and EPA's approval were arbitrary and capricious or otherwise in violation of the APA due to a number of alleged scientific and legal errors. The Court

found CRR's claims meritless, explaining that "[i]t is clear from the administrative record before me that EPA more than adequately considered the relevant factors and provided a reasoned basis for its approval decision." Op. at 17. The Court ultimately concluded that "the record here reflects precisely the sort of cooperative federalism that the CWA envisions." Op. at 28.

Overview. On July 12, 2016, the Center for Regulatory Reasonableness filed a lawsuit in the U.S. District Court for the District of Columbia challenging as arbitrary and capricious (1) EPA's January 23, 2015 approval of Minnesota's combined numeric criteria for nutrients/eutrophication in rivers and streams, and (2) EPA's June 30, 2016 denial of the Center's request for EPA to reconsider and withdraw that approval. CRR's primary argument was that the State's use of BOD5 and diel DO flux as response criteria for determining waterbody impairment was not supported by sound science because, among other issues, neither variable independently causes eutrophication. However, the Court concluded that Minnesota and EPA had fully considered this issue and reasonably concluded that the combined causal and response variables in the standard addressed this concern. More broadly, the Court concluded that EPA had reasonably concluded that the State's action was consistent with the agency's Stressor-Response Guidance and that EPA's conclusions in this area were "a classic example of a case warranting deference... on scientific and technical matters within [EPA's] sphere of expertise."

Key issues. Whether EPA acted reasonably in approving Minnesota's combined criteria, which contain one causal variable (total phosphorous or TP) and four response variables (sestonic chlorophyll a, diel DO flux, BOD5, and pH), specifically with respect to diel DO flux and BOD5, where for a water to be impaired both the TP and at least one of the response variables must be exceeded.

4. New York Recreational Water Quality Criteria

- Summary of Court Decision. On March 15, 2019, the U.S. District Court for the Southern District of New York granted EPA's motion to dismiss a Complaint seeking to compel EPA to promulgate water quality criteria for the waters around New York City, for which EPA had previously approved the State's adoption of the primary contact recreation use. The Court held that Plaintiffs could not bring a Clean Water Act citizen suit claim because the statute requires only that, following disapproval of a state standard submission, a replacement standard must be promulgated "promptly." According to the Court, based on existing caselaw in the Second Circuit, there cannot be a non-discretionary duty for the government to act unless that duty is subject to a statutory "date-certain."
- Overview. On June 29, 2017, a coalition of New York environmental groups—including Riverkeeper, Waterkeeper Alliance, and Natural Resources Defense Council—filed a Complaint in the Southern District of New York alleging that EPA had failed to take appropriate legal action in response to revised primary recreational water quality criteria submitted by New York State. *Riverkeeper, Inc., et al., v. Pruitt, et al.*, No. 1:17-cv-4916 (S.D.N.Y.). In 2015 New York submitted a WQS package to upgrade the designated uses of waters around New York City to primary contact recreation and to adopt stricter fecal coliform-based criteria. In May 2016, EPA responded with a letter that approved the use changes but expressly took no action on the criteria revisions because the criteria were not protective and it was anticipated that the State would submit new criteria

consistent with the 2012 304(a) recommended criteria for primary contact recreation. In their Complaint, the Plaintiffs allege that by taking no action EPA is in violation of its mandatory duty to act on the State's submission of revised criteria.

- Status. On March 7, 2018, EPA expressly disapproved the State's revised criteria submission thereby mooting Plaintiffs' second claim. Shortly thereafter New York City and New York State successfully moved to intervene in the case as co-defendants. Following the Court's dismissal of Plaintiffs' claim that EPA has violated its non-discretionary duty to propose new criteria, Plaintiffs have filed a motion for reconsideration and to amend their Complaint and plead an unreasonable delay claim under the Administrative Procedure Act.
- Key issues. The first key issue is whether Plaintiffs will be able to plead an unreasonable delay claim or must file a new lawsuit. Assuming Plaintiffs successfully plead this claim, the legal issue will be whether EPA has unreasonably delayed in proposing new primary contact recreation criteria.

5. Washington Sediment Management Criteria/ESA ("Net Pens") Litigation

- Summary of Court Decision. On August 7, 2018, the Western District of Washington denied EPA's motion for judgment on the pleadings. The Court found that EPA retained sufficient discretionary involvement or control over the 303(c) water quality standards approval to reinitiate ESA consultation, and if one of the 50 CFR 402.16 reinitiation triggers is met (*e.g.*, new information reveals unconsidered effects to listed species), EPA has the duty to reinitiate. The Court cited several EPA documents, including the 2001 Memorandum of Agreement with the Services and the 2007 "Grubbs memo" as support for the Agency's ongoing discretionary involvement and control over the water quality standards. The Court also found that EPA had a duty to consult with NMFS on approval of the sediment management standard, rejecting EPA's argument that EPA's approval of the standard did not cause any effects because the standard became applicable under the Alaska Rule. Finally, the Court ruled that the scope of that consultation would include effects of net pens, such as disease and escapement risks.
- Overview. On November 4, 2015, the Wild Fish Conservancy filed a complaint in the Western District of Washington, alleging that EPA has a duty to reinitiate ESA Section 7 consultation with the National Marine Fisheries Service, regarding EPA's prior approval of certain sediment management standards ("SMS") in Puget Sound. The Conservancy's claims relate to certain portions of the State of Washington's SMS that accommodate the operation of salmon "net pen" facilities in Puget Sound. The Conservancy alleges that there was an outbreak of infectious hematopoietic necrosis virus ("IHNV") among certain net pen complexes within Puget Sound and a 2017 net pen collapse, and that EPA and NMFS must respond to those events by reinitiating an ESA consultation that was previously concluded in 2011, regarding EPA's 2011 approval of the SMS.
Key issues. (1) Whether the completed approval of a water quality standard (in this case, a sediment management standard) gives rise to an ongoing obligation to reinitiate ESA consultation when there has been a material change of circumstances; (2) If so, whether there has been such a change of circumstances in this case; (3) whether EPA had a duty to consult on the effects to listed species that might arise because of the operation of net pens (*e.g.* disease and collapse); (4) whether EPA had a duty to consult, in 2011, on approval of a standard that became the applicable standard in 1996 under the Alaska Rule

6. Approval of Louisiana's Revised Dissolved Oxygen Criteria

- Summary of Court Decision. On February 25, 2019, the district court granted in part EPA's Motion for Voluntary Remand Without Vacatur. The court remanded EPA's approval to EPA for further proceedings consistent with the court's order. The court vacated Louisiana's new dissolved oxygen criterion except with respect to on permit in which the criterion had been incorporated and maintained the state's new water body boundaries, pending reconsideration on remand.
- Overview. On February 16, 2018, Gulf Restoration Network and four other NGOs filed a lawsuit in U.S. District Court for the Eastern District of Louisiana challenging EPA's June 3, 2016 approval of Louisiana's revised dissolved oxygen criterion for the eastern lower Mississippi River Alluvial Plain ecoregion (eLMRAP). Plaintiffs also challenge EPA's approval of revised boundaries for 42 waterbody segments. Key issues were whether EPA acted reasonably in approving Louisiana's lowered DO criterion for the eLMRAP. Plaintiffs' allege the revised criterion was not supported by available monitoring data and was based on improperly selected reference sites: sites allegedly degraded by pollution and not representative of all waters in eLMRAP. Plaintiffs also allege lowering of DO criterion violated Louisiana's antidegradation policy.

7. Idaho Omnibus Litigation: (Toxics Criteria, Long-term ESA Consultation Obligations, and Scope of CWA Duty to Act on State Submissions)

- Summary of Court Decision. On February 28, 2019, the U.S. District Court for the District of Idaho partially granted EPA's motion to dismiss Plaintiffs' claims on statute of limitations ground. The Court granted EPA's motion with respect to Plaintiffs' claims that EPA failed to initiate ESA consultation in connection with standard approvals taken prior to September 24, 2007 (i.e. six years prior to the Complaint). However, the Court denied EPA's motion with respect to Plaintiffs' claims that EPA failed to act on standard submissions. The Court held that there was no agency action that triggered the start of the statute of limitations and instead that "[e]ach day that passes without the EPA acting on its duty represents a separate and discrete violation."
- Overview. Earthrise Law Center, representing the Northwest Environmental Advocates and the Idaho Conservation League (NWEA and ICL) filed an amended complaint on September 24, 2013 raising claims under the Clean Water Act and the Endangered Species Act. *NWEA and ICL v. National Marine Fisheries Service, Fish and Wildlife Service and EPA* (D.Idaho). The claims against EPA relate to numerous specific interactions between EPA and the State of Idaho over the past 20 years regarding Idaho's water quality standards. The specific legal claims fall into some general categories:
 - Failure to respond to certain submissions of water quality criteria from the State of Idaho WQS.
 - Failure to promulgate mercury criteria for the State of Idaho following disapproval of an Idaho revision to its mercury criteria.
 - Improper reliance on ESA § 7(d) to defer endangered species consultation to after the approval of Idaho toxics criteria.
 - Failure to consult under ESA § 7(a)(2) prior to approving other Idaho submissions.

- Failing to act on non-point source provisions contained in Idaho water quality regulations.
- Status. On May 6, 2015, EPA filed a partial motion to dismiss, for claims beyond the statute of limitations. On February 28, 2019, the Court granted EPA's motion to dismiss, with respect to all claims based on EPA actions taken prior to September 24, 2007. EPA is currently in preliminary discussions with NWEA about potentially resolving the remaining claims through settlement.
- Key Issues. The scope of EPA's consultation obligations on water quality standards under ESA § 7(a)(2); EPA's flexibility to rely on ESA § 7(d) to take action on WQS prior to completing consultation; Scope of state actions that constitute water quality standards; Nature of CWA obligation to prescribe a remedy following disapproval of state standards.

Consent Decree and Settlement Agreement Commitments; Court Orders

8. Washington Omnibus Litigation: (Toxics Criteria, Long-term ESA Consultation Obligations, and Scope of CWA Duty to Act on State Submissions).

- Overview. Earthrise Law Center, representing the Northwest Environmental Advocates (NWEA) filed a complaint on February 10, 2014 alleging claims under the Clean Water Act and the Endangered Species Act. *NWEA v. EPA* (W.D.Wash.). The claims relate to numerous interactions between EPA and Washington State over the past 20 years regarding Washington's water quality standards. The specific legal claims fall into some general categories:
 - Failure to respond to certain submissions of water quality criteria from the State of Washington/Improperly concluding that certain submissions from the State of Washington were not water quality standards.
 - Improperly approving narrative criteria submissions regarding natural conditions and turbidity that fail to protect designated uses.
 - Failure to consult under ESA § 7(a)(2) prior to approving certain Washington water quality standards.
 - Failure to reinstate ESA § 7 consultation on Washington natural conditions criteria.
- Status. In July 2015, the court granted EPA's partial motion to dismiss claims challenging older EPA actions (i.e., actions taken prior to February 10, 2008). Plaintiff filed an amended complaint on September 1, 2015 striking those claims. The parties—including Washington Department of Ecology and several industry-Intervenors—engaged in settlement discussions and entered a Stipulated Dismissal on October 18, 2018 along with a Stay Pending Voluntary Reconsideration.
- Settlement Terms. The Parties agreed to dismiss the ESA claims while EPA completes an ESA effects determination for its February 11, 2008 approval of Washington's revisions to the State's ammonia criteria and, as appropriate, request initiation of any necessary ESA consultation with the Services. If during that time, Washington submits revisions to the ammonia criteria and EPA intends to approve, EPA will complete an effects determination and, if appropriate, request initiation of any necessary ESA consultation with the Services within one year of submission or three years of the Court's approval of the stipulated order of dismissal, whichever is later. With regard to the

remaining Clean Water Act & Administrative Procedure Act claims, the parties agreed to stay the litigation for three years while EPA takes a voluntary remand and reconsiders its approval of Washington's natural conditions criteria for temperature and dissolved oxygen and EPA's determinations that certain challenged provisions were not water quality standard revisions that did not EPA action.

9. Consent Decree: California Selenium Aquatic Life and Aquatic-Dependent Wildlife Water Quality Criteria Rulemaking

- Overview. On June 20, 2013, two environmental groups filed a lawsuit alleging violations of the Clean Water Act (CWA) and the Endangered Species Act (ESA) in connection with EPA's 2000 promulgation of the California Toxics Rule (CTR). *Our Children's Earth Foundation and Ecological Rights Foundation v. EPA* (N.D. Calif.). Plaintiffs alleged that EPA failed to undertake a variety of activities – including the promulgation of water quality criteria for mercury and selenium – that allegedly were required as part of the outcome of the ESA consultation that took place when EPA promulgated the CTR in 2000. Plaintiffs further claimed that although aquatic life criteria for selenium and mercury were originally included in the proposed CTR, they were left unresolved (i.e., “reserved”) in the final CTR. Plaintiffs claimed EPA has a mandatory duty under the CWA and ESA to promulgate them. EPA signed consent decree on August 25, 2014.
- Consent Decree Commitment. EPA agreed to propose selenium criteria to protect aquatic life and aquatic-dependent wildlife, covering all fresh waters of California outside of the San Francisco Bay Delta. (EPA proposed selenium criteria for the Bay Delta on June 30, 2016, and for the Rest of California on November 29, 2018. The Consent Decree requires EPA to finalize such criteria within 6 months of resolving any ESA consultation. EPA is relieved of its obligation to take final rulemaking action if California submits and EPA approves criteria before the deadlines.

10. Consent Decree and Settlement Agreement: Oregon Aluminum Aquatic Life Criteria Rulemaking

- Overview. On March 20, 2015, Northwest Environmental Advocates (“NWEA”) filed a complaint alleging that EPA has failed to promptly propose federal criteria for Oregon with respect to four pollutants (ammonia, aluminum, cadmium, and copper) for which EPA had disapproved Oregon criteria submissions in 2013. *NWEA v. EPA* (D. Ore.). Ammonia was been dropped from the suit due to subsequent EPA action to approve Oregon's update to its ammonia criteria. On April 18, 2016, EPA proposed aquatic life criteria for copper and cadmium in Oregon. The parties reached a settlement of the remaining aspects of the litigation in May 2016.
- Settlement Commitments. By consent decree, EPA agreed to sign a notice of final rulemaking regarding copper and cadmium criteria for Oregon by **January 16, 2017**. EPA approved criteria submitted by Oregon and promulgated cadmium criteria. EPA also agreed to sign a notice proposing aluminum criteria for Oregon by **December 15, 2017**, and sign a notice of final rulemaking by **September 28, 2018**, except to the extent that the duty has been mooted by EPA first approving revised state criteria. EPA negotiated extensions to the deadlines for aluminum. The current deadlines are for EPA to propose by **March 15, 2019** and take final rulemaking action by **March 27, 2020**. In a

companion settlement agreement, EPA agreed to undertake additional technical review of certain Oregon draft NPDES permits while the rulemaking is ongoing.

11. Consent Decree and Settlement Agreement: Idaho Arsenic Human Health Criteria Rulemaking

- Overview. On June 25, 2015, Northwest Environmental Advocates (NWEA), represented by Earthrise Law Center, filed a lawsuit challenging EPA's June 7, 2010 approval of Idaho's revised human health criteria for arsenic. *NWEA v. EPA* (D.Ore.). The complaint alleged that EPA's approval was unlawful because the criteria are not protective of applicable designated uses, which include fish consumption, and EPA's approval was counter to its longstanding policy against adopting Safe Drinking Water Act MCLs as human health criteria where fish consumption is not protected. The parties settled the case in a consent decree and companion settlement agreement in June 2016. Under the consent decree, the court remanded EPA's 2010 approval to the Agency.
- Consent Decree Commitment. Pursuant to the consent decree, on September 15, 2016, EPA disapproved Idaho's arsenic criteria of 10 ug/L and previous criteria of 50 ug/L because they were not protective of Idaho's designated uses, including primary and secondary contact recreation and domestic water supply. Under the consent decree, if Idaho does not adopt replacement criteria that EPA approves by November 15, 2022, EPA shall sign for publication in the Federal Register a proposed regulation setting forth new human health arsenic criteria for Idaho by **November 15, 2022**. If Idaho then does not adopt replacement criteria that EPA approves by November 15, 2023, EPA will sign a notice of final rulemaking action on EPA's proposed arsenic criteria for Idaho by **November 15, 2023**.

Mandatory Duty Lawsuits and Notices of Intent to Sue

12. Approve or Disapprove Idaho Site Specific Criteria for Temperature

- Overview. Idaho Power Company sued EPA in June 2018, alleging failure to perform a CWA non-discretionary duty (to review and approve or disapprove a state submission of revised WQS), as well as alleging an unreasonable delay under the APA. *Idaho Power Co. v. EPA*, No.1:18cv255 (D.Idaho). In 2012, Idaho had submitted site specific water quality criteria for temperature for the Hells Canyon reach of the Snake River downstream from the Hells Canyon dam complex. Under Idaho water quality standards for temperature, the allowable ambient values are set at a higher temperature in the summer than in the winter. The site-specific criteria would establish a two-week period after the end of the summer period at a value between the summer and winter values, thus providing a transitional value. The State is a proposed-intervenor plaintiff.
- Status. EPA and Idaho Power agreed to stay the litigation during which time EPA would take action on the State's submission. EPA prepared a biological evaluation to assess the effects on listed species and submitted document to the Services. The U.S. Fish and Wildlife Service concurred in EPA's finding that EPA's approval of the criteria revision is "not likely to adversely affect" the bull trout, the only listed species within that Service's jurisdiction. EPA's biological evaluation submitted to the NOAA Fisheries found "not likely to adversely affect" some of the listed species within that Service's jurisdiction, and "not likely to jeopardize the existence" of other listed species. NOAA

Fisheries is developing its Biological Opinion. EPA provides regular status reports to the district court. In the next status report, due September 9, 2019, EPA is to notify the court whether NOAA has provided EPA with its Biological Opinion. The subsequent status report is due November 18, 2019, and the stay of the litigation lapses on November 25, 2019, when the parties need to file a motion to govern further proceedings.

Lawsuits Challenging EPA Actions

13. Maine Water Quality Standards for Waters in Indian Country

- **Overview:** This litigation involves Maine's challenge to, first, EPA's alleged failure to act on Maine's January 2013 submission of new and revised water quality standards as they relate to waters in Indian country, and, second, EPA's 2015 decisions, made after the Agency determined that Maine's WQS apply in waters in Indian country, to (1) approve Maine's fishing designated use to include a "sustenance" fishing use for Indian country waters; (2) approve a statutory provision related to tribal fishing as a designated use for certain Indian country waters; and (3) disapprove all of Maine's human health water quality criteria as they apply in Indian country waters. *State of Maine v. Wheeler*, No. 1:14-cv-264-JDL (D. Maine). Following its 2015 disapprovals, on April 11, 2016, EPA proposed certain federal WQS for Maine, including 96 HHC applicable to tribal waters. In December 2016, EPA promulgated final federal WQS in Maine, which are now in effect for CWA purposes. Maine has not challenged EPA's promulgation.

In March and May of 2017, respectively, the State of Maine and a group of dischargers requested that EPA reconsider and reverse its decisions at issue in the litigation and withdraw its federal promulgation. EPA agreed to reconsider its decisions, and thus sought and received stays from the court in order to conduct reconsideration. On July 27, 2018, EPA filed a motion for voluntary remand, indicating that the Agency intends to revise the February 2015 decisions. In December 2018, the court granted EPA's motion and stayed the case until December 3, 2019 to allow EPA time to reconsider and revise its February 2015 decisions.

In June 2019, Maine enacted legislation setting forth a "sustenance fishing designated use" subcategory of the applicable fishing designated use in certain enumerated waterbodies. It also directs the Maine Department of Environmental Protection to adopt rules "no later than March 1, 2020 that calculate and establish water quality criteria protective of human health for toxic pollutants and the sustenance fishing designated use as established pursuant to this Act."

- **Status:** The case is currently stayed until December 3, 2019. EPA is filing status reports every 90 days. In the most recent status report, filed on July 8, 2019, EPA indicated that it "continues to evaluate the timing for taking actions on remand in light of the State's ongoing effort to address sustenance fishing through the enacted legislation and the subsequent required DEP rulemaking."

14. EPA Approval of Washington Human Health Criteria

- **Overview:** On June 6, 2019, the State of Washington filed suit challenging EPA's May 10, 2019 decision reversing EPA's 2016 disapproval of 141 human health criteria

adopted by the Washington Department of Ecology and approving those criteria. *State of Washington v. EPA*, No. 2:19-cv-00884 (W.D. Wash.). EPA partially disapproved and partially approved Ecology's criteria on November 15, 2016. EPA's disapproval was based on a conclusion that the criteria were not based on sound science and protective of Washington's fishing designated use. On November 15, 2016, EPA also promulgated federal criteria for the disapproved criteria. EPA had proposed federal criteria in September 2015 as revisions to criteria applicable in Washington pursuant to the 1992 federal National Toxics Rule. In early 2017, EPA received a petition from several entities to reconsider its disapproval of Washington's criteria. Under EPA's inherent authority to reconsider prior decisions, EPA's May 10, 2019 decision reversed most of its 2016 disapprovals and approved Washington's criteria. On July 23, 2019, EPA proposed to withdraw the federal criteria applicable in Washington. The comment period is open until October 7, 2019.

- Status: EPA filed an answer on August 12, 2019.
- Key Issues: The complaint alleges that EPA's May 10, 2019 approval revised Washington's criteria and was arbitrary and capricious and not in compliance with CWA section 303(c)(4)(A) or (B). The complaint also alleges that EPA lacked inherent authority to revise Washington's criteria without complying with CWA section 303(c)(4)(A) or (B).

15. EPA Approval of Oregon Aquatic Life Criteria

- Overview: On June 27, 2018, Northwest Environmental Advocates (NWEA) filed a complaint in the U.S. District of Oregon against EPA and the Fish and Wildlife Service (FWS) alleging that EPA's 2013 and 2014 section 303(c) approvals of water quality criteria for arsenic, selenium, and zinc were arbitrary, capricious, and not in accordance with law under the Administrative Procedure Act (APA). *NWEA v. U.S. Fish and Wildlife Service and U.S. EPA*, No. 3:18-cv-01420 (D.Ore.). NWEA alleges that EPA's approval violated Section 7 of the Endangered Species Act because EPA and the FWS failed to ensure that EPA's action did not cause likely jeopardy to listed species. Alternatively, NWEA alleges that EPA failed to reinitiate ESA consultation on the zinc and arsenic criteria and failed to consult on the selenium criterion. NWEA also challenges FWS' Biological Opinion for the criteria.
- Status: EPA and FWS filed the Answer on October 1, 2018. NWEA filed a motion to supplement or complete the administrative record and EPA responded. We are waiting on a decision from the Court.
- Key Issues: Whether EPA violated the ESA by approving the arsenic, zinc, and selenium criteria and whether EPA was required to reinitiate consultation on the approval of the arsenic and zinc criteria in Oregon after a biological opinion from FWS found that similar criteria in Idaho jeopardized listed species. Also at issue is whether EPA failed to consult on the selenium criteria.